

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

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FEDERAL COMMUNICATIONS COMMISSION

In the Matter of)
)
Implementation of the)
Telecommunications Act of 1996)
)
Amendment of Rules Governing)
Procedures to Be Followed When)
Formal Complaints Are Filed Against)
Common Carriers)

CC Docket No. 96-238

BELLSOUTH REPLY COMMENTS

BellSouth Corporation, by counsel and on behalf of its affiliated companies, files its reply to comments filed in this matter.¹

Upon reviewing the comments filed in this proceeding, BellSouth is convinced that no amount of adjustment to the current rules affecting parties' rights will ensure timely resolution of formal complaints by the Commission. Eliminating three to ten day intervals here and there from its recently refined, and admirably economical, formal complaint rules will not ensure that the Commission will be in a position to consider, let alone actually decide, pending motions or formal complaints that are ripe for decision. The Commission must first have, or be provided with, sufficient human resources to meet congressional mandates. In the absence of these resources, the only meaningful rule changes will (1) simplify and standardize all complaint procedures related

¹ Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers, Notice of Proposed Rulemaking, CC Docket No. 96-238, FCC 96-460 (rel. November 26, 1996)("Enforcement NPRM").

to telecommunications services, including pole attachment complaints; (2) require the Commission itself to render decisions on contested motions or complaints within a specified period of time;² and (3) provide that any request for an interlocutory ruling by the Commission in a complaint proceeding shall be deemed a voluntary waiver of the applicability of any statutory deadline shorter than five months (in the case of a section 271 complaint, such a request would be deemed to be a consent to a waiver of the 90 day resolution deadline).

Above all, administrative complaint procedures must reflect the entirely different character of Commission proceedings from traditional civil litigation. Telecommunications service providers are always in command of their complaint, and are always free to select a civil forum subject to more liberal, notice-pleading based rules of procedure (and, which, as the Commission notes,³ are in some cases designed for litigation efficiency. No Article III court, with far more resources, is under comparable pressure to resolve commercial disputes in such a short time.⁴ The Commission should only be compelled to resolve in under five months those formal complaints which comport with a strict fact pleading procedural scheme.

² See, e.g., Sprint Comments at 3.

³ Enforcement NPRM at n.54 and accompanying text.

⁴ BellSouth agrees with ACTA that, as a general matter, formal complaint procedures promulgated under §208 have not as yet caught up with the changed structure of the telecommunications industry. ACTA Comments at 1-2. However, it is perhaps §208 itself that is in need of revision in light of the changed structure of the industry, and its new five month resolution deadline may simply be unrealistic in the wake of increased disputes amongst carriers which are, as ACTA observed, essentially disputes between competitors over anti-competitive conduct. *Id.* The Commission, more than ever, needs to differentiate its formal complaint process from civil.

There is no support in the record for the proposition that the Commission's formal complaint procedures themselves inherently prevent the Commission from making decisions on contested motions and complaints at the earliest opportunity. Rather, it is the procedural opportunities to push the limits of the rules, primarily through parties' efforts to obtain wide-ranging discovery and secondarily through the laying of motions that, while proper from a procedural standpoint, proper, may have little connection with the merits of the case, which create problems. Sanctions for filing frivolous pleadings alone are not enough to control such behavior, indeed, it is suspect to assume that such behavior is necessarily frivolous in the context of current legal ethics. As long as formal complaints are prosecuted or defended by lawyers, nearly every pleading that is based on the Commission's procedural rules can be rationalized as appropriate in the name of zealous advocacy. If the Commission had sufficient human resources, it should still in theory be able to decide such complaints and motions at the earliest opportunity. Where staff resources are inadequate, however, and subject to turnover, such activity invariably leads to daunting dockets that are, as a practical matter, incapable of rapid resolution.

The extent of Commission control required in a given docket is inversely proportional to the procedural opportunities available to the parties to expand the proceeding. If all proceedings consisted of a complaint and an answer, little if any Commission intervention is necessary prior to rendering a decision. If only limited discovery through written interrogatories or narrowly tailored information disclosures is available, increased Commission activity may be required to resolve disputes relating to the parties' activities under these rules. Where there are broad discovery opportunities, either through unfettered rights of civil discovery, or, as now, upon a showing of good cause, then the Commission must take an active role in case management if it is

to render decisions within statutory deadlines. The Commission must therefore prune from its rules those procedural opportunities that allow cases to get out of hand in terms of the Commission's ability to manage such dockets to timely resolution. It must be willing to dismiss pleadings that do not in all respects conform with its rules. And it must put parties on notice that their requests for interlocutory decisions will jeopardize any statutory deadline otherwise applicable to the complaint.

BellSouth has shown that the Commission's own pole attachment complaint procedures are the model on which any procedural reform should be based. These procedures, which require pre-filing dispute resolution efforts, initial information disclosures narrowly restricted to the issues in dispute, no discovery of right, and referral of designated issues to an Administrative Law Judge ("ALJ") (after which, all traditional forms of discovery are available on the issues designated for hearing under the Commission's hearing procedure rules, and, presumably, under the control of the ALJ) should describe the procedures generally applicable formal complaint procedures. Whichever way the Commission proceeds with respect to reforming its formal complaint rules, it should adopt standard and uniform rules applicable to all complaint proceedings involving telecommunications service providers.

Should the Commission determine that procedural reform should continue along the lines set forth in the Enforcement NPRM, BellSouth addresses in the remainder of this reply certain comments filed in this proceeding. BellSouth disagrees with AT&T that preconditioning the filing of a formal complaint on a good faith attempt to explore settlement first somehow abrogates rights granted under Section 208.⁵ There is no right to file a complaint that is not based on facts.

⁵ AT&T Comments at 6.

Encouraging pre-complaint negotiations can only facilitate all parties' understanding of the facts out of which any given complaint will arise. BellSouth supports the vast majority of commenters who urge the Commission to adopt rules that will encourage meaningful attempts to settle issues before resorting to the formal complaint process. MFS and TRA have proposed specific certification requirements that are reasonable.⁶

The Commission must do away with information and belief allegations. APCC's argument to the contrary demonstrates why. APCC argues that if a Bell operating company ("BOC") payphone service provider ("PSP") negotiates a deal with a location provider that a competing independent payphone provider ("IPP") cannot or will not enter into, "the IPP provider will . . . understand that is not possible to make a profit on the transaction given the particulars and the economics of maintaining a payphone operation unless" the BOC PSP is breaking the law.⁷ The IPP then files a formal complaint, alleges "cross-subsidy" on "information and belief" and seeks "discovery of the BOC books and records regarding the transaction."⁸ APCC tips its hand that such complaints and corresponding discovery requests will become legion, and competitors will use the Commission's formal complaint process as a tool to obtain their competitors' sensitive business information whenever battles are perceived to be lost in the marketplace. The

⁶ TRA states that complainants "should be required to raise with prospective defendants the concerns that would underlie such actions, prospective defendants should be required to respond to such overtures expeditiously and in good faith, and both parties should be obliged to exercise reasonable, good faith efforts to resolve the controversy. TRA Comments at 10. Both TRA and MFS argue that defendants, in their answer, be under a corresponding certification requirement. BellSouth agrees.

⁷ APCC Comments at 4-5.

⁸ Id.

Commission will undoubtedly be flooded with similar complaints and thus be unable to meet its statutory deadlines.

The mandatory disclosure requirements proposed by the parties should be modified as suggested by a number of parties, who demonstrate their overbreadth for the purpose of facilitating prompt resolution of disputes. Specifically, BellSouth agrees with Ameritech that the structure of §252(b)(2) of the 1996 Act⁹ should serve as a model of such disclosure, and as a substitute for discovery.¹⁰ MFS correctly suggests that replies should be permitted where an answer or a motion raises new issues or otherwise constitutes a defective pleading.¹¹ MFS also suggests that in cases where the Commission has waived procedural requirements, motions to make a complaint more definite and certain should continue to be authorized.¹² BellSouth supports both suggestions.¹³ As to shortening the time to file an answer, comments filed have not demonstrated why the Commission's earlier determination should be reversed. If the Commission does adopt its proposed rule, however, it should delete the "unless otherwise directed" language

⁹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 to be codified at 47 U.S.C. §§ 151 et seq. (1996). The Communications Act of 1934, as amended, including the 1996 Act amendments, codified at 47 U.S.C. § 151 et seq., is referred to herein as the "Act."

¹⁰ Ameritech Comments at 2-3.

¹¹ MFS Comments at 20.

¹² Id. at 8.

¹³ APCC's threshold for "financial hardship" for such procedural waivers, \$8 million in gross revenues and \$20 million in gross assets, is ludicrous. APCC Comments at 6. Further, BellSouth notes that, conclusory allegations aside, there is no real evidence in the record of this or any other proceeding that the Commission's formal complaint procedures operate as a competitive entry barrier.

and allow defendant carriers to rely on a minimum 20 day response period.¹⁴ The Commission should also adopt CEDRA's proposal that would require a formal complaint to be served on the defendant 14 days prior to filing it with the Commission.¹⁵

Bell Atlantic and Pacific Telesis Group persuasively demonstrate that the Commission does not have the authority under the 1996 Act to issue a cease-and-desist order without a Section 312 hearing.¹⁶ BellSouth concurs in their legal analysis and agrees with their conclusions in this regard.

The most contentious issue is discovery, and the comments reveal a range of suggestions from no discovery of right, to limited self executing discovery, to discovery only when issues are referred to an ALJ under the Commission's existing procedures, to discovery as allowed or not allowed in the discretion of the Commission staff, to full discovery under the Federal Rules of Civil Procedure. The sheer time it takes to respond to discovery (which, in civil proceedings, is customarily conducted pursuant to mutually agreed to waivers or extensions of procedural deadlines) counsels against the Commission adopting a proposal that ranges toward unfettered discovery of right under the Federal Rules. Ameritech's initial disclosure as a substitute for discovery is the most salutary proposal in the record.¹⁷ In the event issues raised in a formal

¹⁴ Recently a Notice of Formal Complaint subject to the 12 month deadline was served on BellSouth. The Notice "otherwise directed" that an answer be filed in 20 days. Assuming the Enforcement Bureau has the delegated authority to "otherwise direct" on behalf of the Commission, there is no need to alter the present rule. The Bureau could routinely direct response times of 20 days in complaints subject to a 5 month or less resolution deadline. The Notice should set forth why the time to file an answer is being shortened.

¹⁵ CEDRA Comments at 2.

¹⁶ Bell Atlantic Comments at 6-7, Pacific Telesis Group Comments at 23-24.

¹⁷ Ameritech Comments at 2-3.

complaint proceeding are subsequently designated for hearing, they may be subject to the panoply of discovery tools available under the Commissions hearing procedure rules.¹⁸

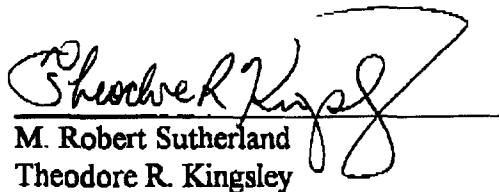
CONCLUSION

The Commission should adopt the proposals set forth in BellSouth's Comments and Reply, which preserve the distinction between judicial and administrative fora and facilitate the prompt resolution of fact based formal complaints, both before and after filing.

Respectfully submitted,

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¹⁸ 47 C.F.R. §§ 1.246, 1.311-1.325.

CERTIFICATE OF SERVICE

I hereby certify that I have this 31st day of January, 1997 served the following parties to this action with a copy of the foregoing BELLSOUTH REPLY COMMENTS by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties on the attached service list.


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